UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

September 30, 1991

UNITED STATES OF AMERICA, Complainant	))	
v.	)	8 U.S.C. 1324a Proceeding
	)	Case No. 90100253
LAND COAST INSULATION, INC., Respondent	))	

DECISION AND ORDER

Appearances:
William F. McColough, Esquire,
Immigration and Naturalization Service,
United States Department of Justice, Boston, Massachusetts,
for complainant;

John Blackwell, Esquire,
Gibbens & Blackwell, New Iberia, Louisiana,
for respondent.

Before: Administrative Law Judge McGuire

BACKGROUND

Land Coast Insulation, Inc. (respondent) seeks administrative review of the alleged facts of violation, as well as the appropriateness of the related $3,500 proposed civil money penalty, set forth in a citation issued and served upon respondent for alleged violations of the employment eligibility verification requirement, or paperwork, provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99 - 603, 100 Stat. 3359 (1986).

On May 30, 1990, following a November 3, 1989 inspection of respondent's employment records at its job site in Rumford, Maine,

complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon respondent's job site foreman, Juan Valencia (Valencia), Notice of Intent to Fine (NIF) HLT-90-000001.

That citation alleged that subsequent to November 6, 1986, respondent had hired the five (5) individuals listed therein for employment on that job site without having completed Section 2 of the pertinent Employment Eligibility Verification Forms (Forms I-9) for those five (5) individuals, in violation of the applicable provisions of IRCA, 8 U.S.C. § 1324a(a)(1)(B), as well as the parallel provisions of the implementing regulations, 8 C.F.R. § 274a.2 (b)(1)(ii).

The five (5) individuals listed in the NIF were: Hermelio Antunez, Benjamin Ocampo, Ramiro Salgado, Julian Ramirez, and Frank Theriault.

The total civil money penalty assessed for those five (5) violations was $3,500, or $1,000 for each of the violations concerning the first three (3) listed individuals and $250 for each of the remaining two (2) individuals.

Respondent was also advised in the NIF of its right to request a hearing before an administrative law judge by submitting an appropriate written request within 30 days of its receipt of that citation.

On June 29, 1990, respondent timely filed such a request.

On August 15, 1990, complainant filed the Complaint at issue with the Office of the Chief Administrative Hearing Officer (OCAHO), realleging therein the charges previously set forth in the NIF, and again requesting that respondent be ordered to pay civil penalties totaling $3,500.

On April 17, 1991, after written notice to the parties, and following protracted discovery activity and motion practice, the matter was heard before the undersigned in Portland, Maine.

SUMMARY OF EVIDENCE

Complainant's evidence was comprised of the testimony of U.S. Border Patrol Agent Vernon P. Annis (Agent Annis), who testified in complainant's c ase-in-chief and also as a rebuttal witness, that of Assistant Chief U.S. Border Patrol Agent Peter Moran (Assistant Chief

Agent Moran), and the rebuttal testimony of Agent Annis and Frank Theriault (Theriault), one of respondent's former employees listed in the NIF and the Complaint. In addition, complainant introduced 18 documentary exhibits which were marked and admitted into evidence as Complainant's Exhibits 1 through 18.

Respondent's evidence consisted of the testimony of Michael R. Morton (Morton), its president, board chairman and principal (48 percent) shareholder, and that of Juan Manuel Valencia (Valencia), respondent's foreman at its Boise Cascade job site in Rumford, Maine during the period at issue. Respondent also placed into evidence six (6) documentary exhibits which were marked and entered into evidence as Respondent's Exhibits A through F.

According to complainant's evidence, this factual scenario began on Friday, October 20, 1989, when one of the five individuals listed in the NIF, Benjamin Ocampo, was arrested in Oxford County, Maine, an adjoining county to that in which the Rumford job site at issue is located. Ocampo was charged with speeding, failing to stop for a police officer, and for failing to have appeared for a court appearance in connection with a previous motor vehicle law violation in Androscoggin County, Maine. Because Ocampo did not have proper documentation, the U.S. Border Patrol was notified and Agent Annis was dispatched to interrogate the subject. Ocampo told Agent Annis that he had illegally entered the United States at San Ysidro, California on April 30, 1989, by using a false Social Security card and other fraudulent documents he had purchased for $150 from a street vendor in Tijuana, Mexico.

Following that entry, Ocampo telephoned a foreman at Decoster Egg Farms in Turner, Maine and secured a job and a loan of $400 to cover his transportation costs to that locality. He presumably began work at Decoster's in early May, 1989, and by the use of payroll deductions had repaid the transportation loan prior to leaving that job on September 29, 1989. He began working for respondent as a construction worker at the Boise Cascade facility in Rumford, Maine on October 5, 1989, or some 24 days prior to his arrest in Oxford County (Complainant's Exh. 1, at 2, 3).

Agent Annis' questioning of Ocampo on October 20, 1989, resulted in the following investigative activity. At about 5:30 a.m. on Thursday, November 2, 1989, Agent Annis, accompanied by another uniformed U.S. Border Patrol officer, William J. Frawley (Agent Frawley), went to respondent's job site at the Boise Cascade paper mill in Rumford in

a marked U.S. Border Patrol vehicle to await the arrival of respondent's then eight-man work crew, which included Valencia, the foreman. The crew arrived at about 6 a.m. in a vehicle owned by respondent and driven by Valencia. Some four or five men alighted from the vehicle, leaving Valencia and two other workers in the front seat. Upon seeing the uniformed officers, two of the men began walking away from Agents Annis and Frawley, but returned upon having been told to do so. Four or five of respondent's workers had no documentation with them and requested that they be permitted to return to their apartment to obtain the documents.

In the course of doing so, two of the workers advised Agent Annis that they were illegal aliens. Those two, Hermelio Antunez and Ramiro Salgado, stated that they had also entered the United States illegally by using fraudulent documents and had also worked at Decoster Egg Farms before becoming insulation installers at respondent's Rumford job site. INS Forms I-213, Record of Deportable Alien forms, were prepared on November 2, 1989 for Ramiro Salgado (Complainant's Exh. 2) and Hermelio Antunez (Complainant's Exh. 3), as had been done earlier in the case of Benjamin Ocampo (Complainant's Exh. 1). The later forms disclosed that Salgado had begun work for respondent in late August 1989 and Antunez had started there on October 16, 1989.

Those three illegal aliens, two of whom, Antunez and Salgado, had been arrested and removed from respondent's Rumford job site on November 2, 1989, comprised three of the five individuals listed on the May 30, 1990, NIF. Those same three workers, Antunez, Ocampo and Salgado told Agent Annis that each had presented counterfeit documents to Valencia in the course of having been hired by him at respondent's Rumford job site (Complainant's Exh. 6, at 2). Of the remaining two workers listed in the NIF, Frank Theriault was found to have proper documentation and continued briefly in respondent's employ in Rumford, and Julian Ramirez, whose true name was later determined to be Sergio Hernandez-Flores, a narcotics trafficker wanted in Texas (Complainant's Exh. 6), who was arrested and removed from respondent's Rumford job site on November 3, 1989.

As of Friday, November 3, 1989, however, the status of Julian Ramirez had not been determined and Agents Annis and Frawley returned to respondent's work trailer on the Boise Cascade job site on that date for the dual purpose of interviewing Ramirez and serving a notice of inspection concerning Forms I-9 on Valencia. Upon arriving,

they advised Valencia, who sent for Ramirez, who was then working for respondent elsewhere on the job site.

While waiting for Ramirez, Agents Annis and Frawley served a U.S. Border Patrol Notice of Inspection, dated November 2, 1989 (Complainant's Exh. 4), upon Valencia, who read it and advised Agent Annis that he understood that, according to the wording of that notice, respondent's Forms I-9 were to be made available for inspection by November 8, 1989, some five days later.

Valencia waived the three-day notice to which respondent was entitled prior to producing the Forms I-9 for those hired after November 6, 1986, and affixed his dated signature on the lower portion of that Notice of Inspection (Complainant's Exh. 4). Valencia readily produced the originals of seven Forms I-9, including those five which had been prepared for the five individuals named in the NIF, and those prepared for two other employees who are not involved in this proceeding, Alfonso Berlonga Garza and Jose Luis Pavon (Complainant's Exh. 5).

Agents Annis and Frawley made copies of those Form I-9 originals and returned them to Valencia, who made no mention that other Form I-9 originals or copies were maintained elsewhere, nor did he say anything concerning his receiving any assistance in completing the Forms I-9, nor did Valencia suggest that the agents contact anyone at respondent's corporate headquarters in New Iberia, Louisiana in connection with those forms, nor did he state or even indicate that he had done so, either out of necessity or in the ordinary course of following respondent's record keeping policies. And those nondisclosures were noted even after Agents Annis and Frawley had specifically pointed out to Valencia how the five Forms I-9 originals at issue had been improperly prepared.

On November 2, 1989, also, Agent Annis telephoned his investigation findings to his superior, Assistant Chief Agent Moran, who ordered that an INS notice of inspection be served on respondent at its Rumford job site for the purpose of conducting an audit of the Forms I-9 prepared in the course of hiring employees at that location.

Following the visits by Agents Annis and Frawley to respondent's work trailer on November 2 and 3, 1989, in the course of which two of the illegal aliens, Antunez and Salgado, had been arrested and removed from the job site, as well as fugitive Ramirez, Valencia's work crew had been reduced from seven to four workers.

Following those visits, also, the U.S. Border Patrol case file, which included an investigative memorandum (Complainant's Exh. 6), was forwarded to Assistant Chief Agent Moran in Houlton, Maine. Based upon the data in that case file, he issued the May 30, 1990 NIF at issue, in which the $3,500 civil money penalty was levied.

In assessing that $3,500 penalty, consideration was given to respondent's history of prior IRCA violations namely, having been cited some 20 months previous to the November 2, 1989 inspection date, or on March 28, 1988, for essentially identical paperwork violations, i.e. for having variously failed to prepare Sections 1 and 2 of the then pertinent Forms I-9 within the required period of three business days of having hired nine workers at another of respondent's job sites, one located in Portland, Maine (Complainant's Exh. 7, at 13-19).

Those nine individuals were identified on page 5 of that March 28, 1988 INS Citation POM 274A-41 as being: Juan J. Cerna, Gabino E. Flores, Pedro V. Calzoncinth, Santos B. Calzoncinth, Juan R. Es pinoza, Soria Jesus Moncada, Evidio V. Gonzales, Gilberto A. Vill arreal, and Adolfo Z. Hernandez.

That citation had been issued following an inspection of respondent's IRCA-related documents in a work trailer on that Portland job site on March 9, 1988. Respondent's foreman at that location, Dewey Howell, had provided Agents Taber and McCaslin with a list of the 11 employees then working for respondent on that job, which involved the construction of a refuse facility. Those 11 workers, all of whom were Hispanic males and only two or three of whom spoke English, were called into Howell's office for interviews. Four of those interviewed, Alfredo Franco, Narciso Aguilar, Carlos Loya, and Francisco Lucio, were placed under arrest as illegal aliens having no right to work in the United States (Complainant's Exh. 7, at 4, 6).

Respondent was not assessed a civil money penalty in connection with the issuance of NIF POM 274A-41 on March 28, 1988 for the alleged IRCA paperwork and illegal hiring violations described therein.

Meanwhile, respondent's evidence has made available the following version of the disputed facts at issue.

Michael Morton testified that he is the president, board chairman and principal (48 percent) shareholder of respondent firm, a closely- held (five shareholders) Louisiana corporation incorporated in 1974,

which specializes in installing industrial insulation at job sites throughout the United States and in Trinidad and the Cayman Islands in the Caribbean.

Its 300-person work force is comprised of 25 persons who staff its corporate headquarters in New Iberia, Louisiana, 7 persons in its principal sales office located in Houston, Texas, 1 person assigned to a sales office in Decatur, Illinois, and the remainder are field personnel staffing an average of some 25 ongoing jobs throughout the United States and the Caribbean. Each of those jobs is headed by a foreman/supervisor, some 50 per cent of whom are Hispanic, as are about 70 per cent of the workers on those jobs.

The job site in question involved a $100-million operation involving a Boise Cascade paper mill located in Rumford, Maine. The primary contractor was Fluor Corporation and one of the subcontractors was Pyro Power Corporation, the firm for which respondent performed its industrial insulation work. Respondent's work force on that job averaged some 30 workers and the operation extended over an 11-month period, from July 1989 to June 1990.

Valencia, who was respondent's foreman on that job throughout, was paid by the hour, and had not been designated as an agent for process of service, nor was he the custodian of any official company documents.

Morton testified that all of respondent's records are maintained at its corporate headquarters in New Iberia and that his duties as president and chairman of the board include serving as the custodian of all corporate records, including having sole authority to decide when to dispose of any such records.

He also stated that Valencia, as the Rumford foreman, had been given complete authority to determine the number of employees which he needed on that job and Valencia was also empowered to hire, fire, and set the wages of all workers there.

Morton also disclosed that Valencia's supervisor during the Rumford period was Ed Morton, the witness' brother, who serves as respondent's operations manager. He did not know whether or how often his brother, as Valencia's supervisor, had visited that job site during its 11-month pendency. Morton stated that he had been to the Rumford location twice during that period, but did not advise of the dates or purposes of his visits.

He also testified that respondent maintains records for all employees, including Forms I-9, which are kept in the personnel files in New Iberia. Kim Broussard (Broussard), the firm's payroll clerk, whose monthly salary he guessed to be about $2,000, is primarily responsible for maintaining those forms. Morton was shown copies of the five completed Forms I-9 at issue (Respondent's Exhs. A - E) and stated that all notations other than Valencia's which appear thereon were those of Broussard, but he was not present when she did so and he does not know the date upon which the Forms I-9 at issue were received at respondent's corporate headquarters in New Iberia, nor did he know the date upon which Broussard had completed the Forms I-9 at issue (T. 186, 187). He testified that Broussard normally completes those forms before issuing a payroll check, which is done weekly (T. 186). Morton also stated that Valencia always sent the original Forms I-9 to respondent's corporate headquarters in New Iberia by overnight delivery, using Federal Express.

On cross-examination, Morton testified that he could not state whether Broussard checks every required box in every Form I-9 as she has been instructed to do, but that Broussard cannot issue salary checks unless all paperwork is properly completed (T. 218, 219).

Morton also stated that respondent has a written policy concerning the completion of Forms I-9 but he did not know whether any employees in the field ever received copies of that written policy or written instructions concerning the manner in which those forms are to be completed.

Upon cross-examination, however, when shown Complainant's Exhibit 8, an eight-page exhibit consisting of a document captioned "Land Coast Insulation, Inc. Foreman's Form Packet Effective April 2, 1988", he testified that that document, purportedly issued on that date to all of respondent's foremen and supervisors by respondent's comptroller, H. J. Wilson, did not in fact represent respondent's official policy. Instead, the information in that packet consisted merely of instructions to respondent's foremen (T. 202).

Morton also testified that that document's issuance on April 2, 1988 was not related in any manner to INS Citation POM 274A-41 which had been issued only five days earlier, on March 28, 1988, concerning IRCA related paperwork violations involving Forms I-9 at respondent's then ongoing Portland, Maine job site. But he conceded that the written instructions concerning Forms I-9 in that April 2, 1988 packet had failed to advise the foremen that Broussard was the person to

whom those forms were to be sent, because on the fifth page therein the foremen and supervisors were clearly told to send Forms I-9, together with other listed documents, to the comptroller's office, as opposed to Broussard, and to do so no later than one week after the initial employment date (Complainant's Exh. 8, at 5).

He also testified that he was certain that Valencia had received a copy of that April 2, 1988 eight-page foreman's form packet and acknowledged that on the second page of that packet Valencia, and all other foremen and supervisors, were advised by respondent's comptroller, H. J. Wilson, that "you are also Land Coast's representative on the job." (Complainant's Exh. 8, at 2).

Morton also testified that foremen and supervisors are regarded as very important employees of respondent who can hire and fire workers on their job sites. It was also developed, in the course of cross- examination, that that April 2, 1988 form packet had advised all foremen and supervisors that paperwork was one of their most important responsibilities. He testified that in spite of that statement in the form packet, foremen and supervisors, in reality, received no punishment if the paperwork was not completed (T. 205).

Morton also stated that he lived in El Paso, Texas until 1964 and is familiar with the incidence of illegal immigration to the United States by citizens of Mexico. He testified that he never reviews the surnames on Valencia's payroll because that is a matter for Broussard, the payroll clerk. But he was not surprised to learn that in excess of 90 percent of Valencia's crew at Rumford were Hispanic, and he felt that Theriault was probably the only non Hispanic in that 11-month operation. He did not know the manner in which Valencia hired his work force in Rumford, but stated that some workers had gone to that job site from Texas with Valencia initially and others were hired in Rumford. Respondent does not pay travel expenses to the job site for newly-hired employees.

He also testified that respondent's foremen participated in a profit sharing plan. Valencia had not participated in such a plan while working in Rumford, although he had so participated on prior jobs. And on some jobs Valencia was rewarded by hourly salary increases for controlling costs, which was partially accomplished by reducing the total cost of the salaries of the members of Valencia's work crew.

Morton stated that Valencia's increase in salary, effective on June 16, 1986, contained the written explanation that as an area foreman on

Job 1270, the GAA Project had been completed under budget (Complainant's Exh. 14, at 6). He stated that the GAA Project involved a chemical plant in Freeport, Texas.

Respondent's second and final witness was Juan Manual Valencia, respondent's foreman at all times relevant herein on its Rumford, Maine job site. He testified that he is 36 years of age and presently resides with his wife and four children in Atlanta, Texas, which is near Texarkana, Arkansas, where he currently works for respondent as a field supervisor/superintendent.

He was born in Mexico, has one year of formal education, came to the United States in 1973 and began working for respondent in 1978 as an insulation installer and has remained in respondent's employ since that time. The Boise Cascade job in Rumford, Maine had begun in June 1989, when he and eight other of respondent's employees went there from Texas. That job was scheduled for five months, but owing to unidentified problems it required 11 months to complete. His working crew, all of whom he hired in Rumford or elsewhere, and all of whose salaries he determined, based on their willingness to work, numbered 32 at its largest. Before that job was completed, he had hired 12 to 20 workers from the Rumford area and about 25 others came from three Texas cities, Dallas, Freeport and Houston (T. 302). Valencia stated that those workers came to Rumford after he placed telephone calls to those cities (T. 303).

Valencia also testified that he was not authorized to sign contracts for respondent, nor was he ever designated as his employer's agent to receive process of service, nor was he the custodian of any of respondent's records. However, his duties included hiring and firing workers on that job site, setting their salaries, depending upon their job performance, buying job supplies in amounts not exceeding $20, for which he was reimbursed, and handling employment paperwork, including the Forms I-9, which he stated he could not complete correctly (T. 323-326) until Agents Annis and Frawley showed him how to do so in the course of their initial visit on November 2, 1989 (T. 274). He also testified that his boss, Ed Morton, had asked him previously why he didn't complete the Forms I-9 on the job site. He told Ed Morton that he had difficulty reading and understanding the form. Morton attempted to show him how to do so on three occasions, but without success (T. 277).

Valencia stated that during his 11-month service as foreman on the Rumford project his boss, Ed Morton, had visited the job site on four

occasions in order "to check our jobs to be sure that we're not lying or stuff like that" (T. 332). He also testified that Ed Morton was the only person from the respondent firm to visit the Boise Cascade job site in Rumford, Maine (T. 332-333).

Valencia testified variably and inconsistently concerning his handling of Forms I-9 at issue. He stated that he checked the documentation of workers being hired at Rumford, but that he did not know how to complete Section 2 of the Forms I-9 (T. 257). He would sign the lower part of the Form I-9 and send the forms to New Iberia by regular mail (T. 264). After having signed each of the five forms I-9 at issue, he sent those forms to respondent's home office in New Iberia, using regular mail (T. 263). He variously testified that after sending those forms by regular mail he would routinely receive a telephone call from Brous sard within 3 to 4 days, 4 days, and 4 or 5 days at the most (T. 266).

Upon being cross-examined on that testimony, Valencia stated that after he checked the documentation for newly hired workers, and signed Section 2 of the Forms I-9 and mailed those forms to New Iberia, he would supply the missing information to Broussard by telephone between five and eight days after having mailed the forms (T. 280, 281). He also testified that it took between five and eight days to get the forms to respondent's corporate headquarters in New Iberia, depending upon whether he had sent them by regular mail, which he did on some occasions, or by air borne delivery, which he also did on some occasions. He could not remember (T . 284).

Valencia also testified that on November 3, 1989, the date of the U.S. Border Patrol inspection involving the Forms I-9, he was told to sign the INS Notice of Inspection form and did so, after having "half readed it" (T. 271), because he has difficulty with speaking and understanding English. On November 2 and 3, 1989, there were 14 employees of respondent on the Rumford job, but he had retained only those copies of the Forms I-9, seven in number, which involved those recently hired, and of those he had hired five or six men in October, 1989.

He stated that overall he had hired some 30 workers between June 1989 and November 1989, and all of the Forms I-9 except the five at issue in this proceeding had been completed properly. Valencia also recalled that some three or four days before the November 3, 1989 Forms I 9 inspection he had received a telephone call from Broussard, in which she informed him that the five Forms I-9 at issue had not been completed properly (T. 270). He testified that he had failed to mention that fact to Agents Annis and Frawley because he had

forgotten about Broussard's telephone call and also because he did not think that it was important (T- 291).

Valencia also stated that none of his past raises were tied to, or influenced in any manner by, his having brought jobs in under the budgeted amounts, and he could not recall the raise he had been given on June 16, 1986 in connection with his work on the GAA Project, Job 1270 involving a chemical plant in Freeport, Texas. Upon being shown the documentation for that raise (Complainant's Exh. 14, at 6), he stated that he had gotten that raise only because he then had not received a raise in over a year (T. 297-300).

He also testified that some of his Rumford workers had been arrested at that job site in the course of the U.S. Border Patrol visit on November 2, 1989 and that he had secured replacement workers shortly thereafter by placing a telephone call to Texas. Those replacement workers were alien Mexican nationals, all of whom had visas, which he checked very, very carefully (T. 304).

Valencia further testified, in the course of cross-examination, that he had entered the United States illegally in 1973, began securing work permits in about 1977, started working for respondent as an insulation installer in 1979 and became a permanent legal resident in 1984.

He further stated that in 1976 he had appeared before an immigration judge in El Paso, Texas and was given a permit to remain and work in the United States. But Valencia conceded that that assertion was contrary to the information contained in a copy of a four-page INS Immigration Judge's Decision dated July 23, 1976 (Complainant's Exh. 15), in which Valencia was found to be in the United States illegally and deportable, and had been granted until October 25, 1976 to voluntarily depart for Mexico, in lieu of having been ordered deported therein after stating to the immigration judge that he would return to Mexico and remain for one year. Valencia stated that he returned to Mexico on the following day, and instead of remaining for one year as ordered, he stayed for only two weeks and reentered the United States illegally because "that's not what I really wanted to do." (T. 311).

In reply to further inquiries on cross-examination, Valencia testified that he had appeared before another INS immigration judge on March 17, 1977 (Complainant's Exh. 16, at 2), and again promised the judge that he would voluntarily return to Mexico in lieu of being ordered to be deported. Again, he was taken to Mexico and released, only to again illegally reenter the United States shortly thereafter (T. 314-315).

Valencia also stated that he had appeared before a third INS immigration judge later in 1977 (Complainant's Exh. 17), and for the third time he agreed to return to Mexico voluntarily and thus avoid having been ordered to be deported and, as he had done on the prior two occasions, he did not remain for one year. Instead, he illegally reentered the United States without remaining in Mexico for that period of time.

During cross-examination, also, he testified that he had never seen a fraudulent green card, had never known anyone who possessed such a card, and cannot tell the difference between a legitimate green card and a fraudulent one (T. 315, 316). When shown the copy of the Form I-9 prepared for Ramiro Salgado, as provided by respondent (Respondent's Exh. A), and which he had signed as respondent's foreman on October 9, 1989, he was requested to read aloud the attestation wording which appears immediately above his signature, to the effect that as the attesting person, under penalty of perjury, he had examined the documents presented by Salgado and that they appeared to be genuine and to have related to Salgado and that Salgado was eligible to work in the United States.

He read that wording without difficulty, with the exception of having been unable to pronounce the word "attest", but he testified that he knew the meaning of that word. He denied having failed to fill in the appropriate blocks in Sections 2 of the Form I-9 concerning Ramiro, furnished to and copied by Agents Annis and Frawley during the course of their November 3, 1989 inspection (Complainant's Exh. 5, at 2), because he was then aware that Ramiro's documentation, listed later in New Iberia reportedly by Broussard as being a green card numbered 35-221-870, was not valid. His explanation having been "I guess for some reason I didn't complete it. That's all. But there's. . . . .there was not a reason." (T. 317).

Complainant's rebuttal evidence, as noted earlier, was comprised of the testimony of Agent Annis and Theriault. The former testified that he had been furnished the originals of certain Forms I-9 by Valencia at respondent's Rumford job site on November 3, 1989, and that the markings thereon were in ink. On cross-examination, however, he stated that Valencia's signature and all other data at the bottom of the original of the Form I-9 concerning Benjamin Ocampo, a copy of which was marked and entered into evidence as Respondent's Exhibit C, had been entered in pencil, but that all other writings thereon were in ink. Agent Annis stated that in view of the penciled notations on the original of that Form I-9, which respondent produced at the hearing

and a copy of which, rather than the original, was entered as Respondent's Exhibit C, he was obviously in error on that point. He also testified that he is capable of discerning between originals and photocopies since he sees a thousand or so of the latter each year.

Theriault testified that he had worked at respondent's Rumford operation briefly, for less than one month in total, during parts of October and November, 1989. He had been hired as a welder, at $9 hourly, by Valencia, who requested that he not disclose that hourly salary to any of his coworkers.

He was one of the occupants of the vehicle which delivered the respondent's Rumford crew for work at the Boise Cascade plant early on the morning of November 2, 1989. He stated that all of the workers riding in the rear of the vehicle jumped out and left upon seeing the uniformed U.S. Border Patrol officers, but stopped and returned upon having been ordered to do so. Some four to six workers left the job site initially and only three or four returned to work an hour or so later.

Theriault also stated that he spoke to Valencia later that day about the incident and inquired as to how Valencia would manage with one-half of his work crew leaving or having been taken away. Valencia stated that there was no problem, that he would place a telephone call to Texas and arrange for replacement illegal workers to be in Rumford within a few days. Valencia also told him that on one of the other of respondent's prior jobs in Louisiana or Georgia, there were some 50 illegal aliens in respondent's work force at that job site (T. 341, 342).

He testified that for the first five days that he worked for respondent in Rumford, he was the only worker from Rumford. But following INS' arrest and removal of workers on November 2, 1989, Valencia hired three or four other Rumford residents for that operation, but they were all discharged when the six illegal workers arrived from Texas shortly after November 2, 1989 in response to Valencia's telephone call. He stated that he had been kept on respondent's payroll only because he was the only worker who could do any welding (T. 344, 345).

On cross-examination, Theriault testified that he had not left respondent's employ voluntarily, although he had received a written slip from Valencia to that effect, and that he had had differences with Valencia. He also stated that he had served in the U.S. Navy until March, 1, 1977, when he left after having been charged with possession of marijuana, and that he was found guilty of a charge of carnal knowledge of a 17-year old in September 1990, for which he was

sentenced to serve eight months, all but 30 days of which had been suspended. More recently, he was convicted of the illegal possession of moose parts, specifically hind quarters, at the end of the last hunting season. It was also determined that he had testified on complainant's behalf without having been subpoenaed to do so, and had received a reimbursement payment for his mileage and meal expenses (T. 351-355).

On re-direct examination, Theriault stated that he had been interviewed on July 5, 1990 by Agent Annis and had given a six-page signed statement on that date concerning his employment at respondent firm (Complainant's Exh. 18). When having been asked by Agent Annis in that statement interview whether and when Valencia may have requested any pre-employment documentation, Theriault had stated that he had not been requested to show his Social Security card and another form of identification until shortly before he had received his first pay check, which was received about two weeks after he began working for respondent in Rumford (T. 360).

In that six-page statement, also, Theriault recounted that he had a conversation with Valencia in the Rumford work trailer on November 2, 1989, shortly after the initial visit by Agents Annis and Frawley earlier on that date, in the course of which some of respondent's workers had been arrested, and that Valencia readily admitted having arranged to have illegal aliens work for respondent and that Valencia had stated that on one other occasion he had rented a Ryder truck for that purpose. He also testified that Valencia had stated that he had arranged to secure counterfeit identification documents for Mexican workers and that he could furnish all necessary documentation. Valencia was also reported to have stated that in order to avoid having respondent pay the return travel expenses of those workers, he would notify INS, presumably at the conclusion of the job for which the illegal aliens were hired, and advise INS of their status, whereupon INS would apprehend those workers and pay for their return to Mexico (Complainant's Exh. 18, at 4, 5, 6).

ISSUE(S)

The threshold issue to be addressed is that of determining whether, as complainant has alleged, respondent has violated the employment eligibility requirement, or paperwork, provisions of IRCA, set forth at 8 U.S.C. § 1 324a(a)(1)(B) and the pertinent provisions of the implementing regulations, at 8 C.F.R. § 274a.2(b)(1)(ii).

Resolution of that inquiry will be accomplished by determining whether in hiring the five employees listed in the NIF at issue respondent discharged its statutory and regulatory obligation to have completed, within three business days of the respective hires, the employer documentation review and verification requirements set forth in Section 2 of the Forms I-9 for each of those five employees, which includes examining the documents presented by the five individuals involved concerning their eligibility to work in the United States, and attesting to that fact on each of the five Forms I-9 at issue.

Should that inquiry be resolved in the negative, that is in favor of complainant, a second issue is presently, namely, the amounts of the civil money penalties which should appropriately be assessed for those violations.

The relevant statutory wording at issue is that which has been codified at 8 U.S.C. § 1324a, the applicable implementing regulations utilized are those set forth at 8 C.F.R. § 274a.1-.11 and the rules of practice and procedure employed are found at 28 C.F.R. § 68.1-.52.

Complainant's evidentiary burden of proof in this 8 U.S.C. § 1324a proceeding is that of demonstrating by a preponderance of the evidence that respondent has violated the paperwork provisions of IRCA by having failed to properly complete Section 2 of the five Forms I-9 at issue. 8 U.S.C. § 1324a(e)(3)(C).

Our discussion begins with the pleadings and arguments of the parties.

Complainant initiated this proceeding by filing a Complaint which adopted by reference the allegations set forth in the NIF at issue, to the effect that respondent, as previously noted, had failed to complete Section 2 of the five Forms I-9 in dispute and, resultingly, had violated the pertinent provisions of IRCA and the implementing regulations.

In its answer, respondent denied generally all allegations in the Complaint and asserted three affirmative defenses: (1) that the Complaint fails to state a cause of action because of the failure to state that the five individuals identified in the NIF were in fact unauthorized or illegal aliens; (2) that the provisions of 8 U.S.C. § 1324a(a)(1)(B) are unconstitutional to the extent that they regulate the employment practices of an employer as concerns individuals who are not in fact unauthorized or illegal aliens; and (3) that the five individuals identified in the NIF were not unauthorized at the time of their

hiring, that completed Forms I-9 for all five such individuals were maintained at respondent's principal place of business in New Iberia, Louisiana and that in the event that it is found that respondent has violated the provisions of IRCA as alleged, the proposed civil penalty of $3,500 should be reduced since respondent has maintained properly completed Forms I-9 at its principal place of business.

In addition to the arguments set forth in its responsive pleading, respondent has advanced these additional contentions: (1) that its foreman, Valencia, had no authority to waive the three-day waiting period concerning complainant's inspection of the five Forms I-9 at issue; (2) that Valencia was not the custodian of respondent's records; (3) that service of and citations and documents upon Valencia did not constitute valid service on respondent; (4) that complainant has erroneously charged that respondent had only one opportunity to complete the Forms I-9 within a specified time frame inasmuch as the statutory provisions of IRCA do not set forth such a time requirement; (5) that complainant's case rests upon a showing that the Forms I-9 which Valencia produced were those which the provisions of IRCA required respondent to maintain; and (6) that the Complaint should be dismissed because the respondent has demonstrated that it maintained completed Forms I-9 on the five individuals at its corporate headquarters in New Iberia, Louisiana.

Meanwhile, complainant urges that this proceeding involves only two issues: (1) whether the five Forms I-9 originals which were made available by Valencia to Agents Annis and Frawley in the course of the document inspection at respondent's Rumford, Maine job site on November 3, 1989 had been completed properly; and (2) if not, determining the appropriate civil money penalties which should be assessed for those infractions. Complainant also maintains that respondent has attempted to create additional, irrelevant issues, those which relate principally to respondent's not being responsible for Valencia's acts.

We address respondent's initial argument that the Complaint fails to state a cause of action because complainant has failed to allege that the five individuals identified in the NIF were in fact unauthorized or illegal aliens. I find that contention to be without merit because the status of individuals involved in verification of employment eligibility, or paperwork, violations is irrelevant and immaterial. The provisions of 8 U.S.C. § 1324a(a)(1)(B) make no mention of an individual's status, it only provides that it shall be unlawful to hire an individual without complying with those employment verification requirements set forth

at 8 U.S.C. § 1324a (b). The unauthorized status of an individual is only relevant and material in those inapplicable situations in which it is alleged that a person or other entity has knowingly hired such an unauthorized alien, contrary to the provisions of 8 U.S.C. § 1324a (a)(1)(A), or in those situations in which it is alleged that a person or entity continues to employ an alien in the United States knowing that the alien is, or has become, an unauthorized alien in contravention of 8 U.S.C. § 1324a (a)(1)(B).

There is an additional and obvious basis upon which to reject respondent's argumentation offered in support of its asserted affirmative defense that complainant has failed to show that the five workers at issue were unauthorized or illegal aliens. That because the evidence has clearly demonstrated that Ocampo, Antunez, and Salgado were in fact illegal aliens. That was the reason Ocampo had not returned to work following his arrest and incarceration in Oxford County on October 20, 1989, and the unauthorized status of Antunez and Salgado resulted in their having been arrested and removed from respondent's Valencia-led eight-person Rumford work force only 13 days later, on November 2, 1989, in the course of the initial enforcement visit.

Next, we examine respondent's argument that the provisions of 8 U.S.C. § 1324a(a)(1)(B) are unconstitutional inasmuch as that section of IRCA regulates the employment practices of an employer concerning individuals who are not in fact unauthorized or illegal aliens. As noted in the preceding paragraph, the provisions of 8 U.S.C. § 1324a(a)(1)(B) are not at issue, rather we are called upon to examine the wording of 8 U.S.C. § 1324a(a)(1)(B) and its regulatory analog, 8 C.F.R. § 274a.2(b)(1)(ii). Accordingly, we focus thereon, instead.

In advancing that constitutional argument, respondent has advanced no bases, either decisional, statutory, or regulatory, in support of that position. Owing to the relative recent enactment of IRCA, there is a paucity of rulings in that area but in those few cases which have been ruled upon to date, that statute has not been found to be so impaired. Big Bear Super Market v. INS, 913 F. 2d 747, 757 (9th Cir. 1990); Maka v. INS, 904 F. 2d 1351, 1356-57 (9th Cir. 1990); Mester Manufacturing Co. v. INS, 879 F. 2d 561, 569 (9th Cir. 1989).

Respondent then advances the assertion that, should it be found to have violated the paperwork requirements as charged, the proposed civil penalty assessment should be reduced, owing to respondent's show of good faith in having properly maintained completed Forms I-9

on all of its employees at its principal place of business in New Iberia, Louisiana.

In cases involving only paperwork violations, as here, a showing of good faith may not be shown in order to contest the fact of violation, but good faith is one of the five criteria to which due consideration shall be given in determining the amount of the civil money penalty. 8 U.S.C. § 1324a(e)(5). U.S. v. Multimatic Products, 1 OCAHO 221 (August 21, 1990); U.S. v. USA Cafe, 1 OCAHO 42 (February 6, 1989).

Accordingly, in the event that it is found that respondent did violate the paperwork provisions as alleged, due consideration will be given to any showing of good faith which has been demonstrated by respondent in determining the appropriate civil money penalty to be assessed herein.

Respondent also urges that its foreman, Valencia, had no authority to waive the three-day waiting period in connection with the November 3, 1989 inspection of the Forms I-9 at issue, that Valencia was not the custodian of respondent's records, and that service upon Valencia was not tantamount to service of process on respondent.

Under the pertinent section of the implementing regulations, 8 U.S.C. § 274a.2(b)(2)(ii), complainant was entitled to inspect respondent's Forms I-9, and respondent was entitled to three days notice prior to that inspection. Forms I-9 must be made available in their original form or on microfilm or on microfiche at the location where the request for production was made. If Forms I-9 are kept at another location, the person or entity must inform the Department of Labor or Service (INS) officer of the location where the forms are kept and make arrangements for the inspection.

It is clear then from the foregoing that Agents Annis and Frawley were entitled to inspect the originals of all Forms I-9 in respondent's work trailer at Rumford, Maine on November 3, 1989. Valencia was served with the pertinent Notice of Inspection which was directed to respondent and dated November 2, 1989, in which respondent was clearly notified in advance therein that a review of all Forms I-9 would be conducted on November 8, 1989. In that notice, also, respondent was clearly advised that the three-day notice could be waived by signing the lower portion of that form. Valencia affixed his dated signature on the lower portion of that notice (Complainant's Exh. 4).

In urging that Valencia had no authority to waive the three-day notice period and did not have authority to accept process of service on its behalf, respondent's argument has been eroded by the realities of its relationship with Valencia, its onsite foreman in Rumford, who was clearly respondent's agent for purposes of process of service, as well as an employee empowered to waive the three-day inspection notice.

There is ample authority in support of the proposition that a principal is chargeable with, and bound by, the knowledge of or notice to its agent while the agent is acting within the scope of his authority in reference to matters over which his authority extends. U.S. v. Y.E.S. Industries, 1 OCAHO 198 (July 6, 1990); citing Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215 (1923); U.S. v. Valdez, 1 OCAHO 91 (September 27, 1989).

Simply stated, respondent cannot have it both ways. Even a cursory reading of this hearing record, as summarized earlier herein, is most persuasive in demonstrating that Valencia had nearly unlimited authority to act on respondent's behalf in Rumford. As noted earlier, the statement which appears on the second page of the April 2, 1988, Land Coast Insulation, Inc. Foreman's Form Packet to the effect that "you are also Land Coast's representative on the job" summarizes Valencia's role in Rumford rather succinctly. Rather than again detailing the extent of his authority, as expressed in listing those day-to-day prerogatives he exercised on his employer's behalf, it might be more instructive and pragmatic to determine anything which Valencia could not have realistically done on respondent's behalf on that job site.

A finding that Valencia, who was indisputably in charge of respondent's activities in Rumford, Maine, was an agent of respondent for purposes of process of service is also supported by the landmark decision in International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154 (1945), in which it was held that notice delivered to an employee of a business is generally considered to be notice to the business itself, and adequate to bind the corporation with the consequences of that agent's response, or non-response, to the document served. In addition, the finding that Valencia was respondent's agent is further supported by OCAHO rulings involving analogous factual situations. U.S. v. Y.E.S. Industries, supra; U.S. v. Valdez, supra.

Having found that Valencia was an agent of respondent, the notice of inspection served upon him, as foreman and respondent's highest ranking employee on the Rumford work site, constituted service upon

respondent since it has been previously held that in employer sanctions cases, service of such notice upon a lower ranking employee constitutes adequate notice to the employer. U.S. v. Big Bear Market, 1 OCAHO 48 (March 30, 1989), aff'd, Big Bear Supermarket No. 3 v. INS., 913 F. 2d 754 (9th Cir. 1990).

There is further decisional authority to the effect that notice to an employing entity is properly effectuated upon a showing that a notice of inspection has been communicated to an agent of that entity, U.S. v. Buckingham Ltd. Partnership d/b/a Mr. Wash, 1 OCAHO 151 (April 6, 1990).

Respondent's next argument concerns the time limitations which are imposed upon employers in connection with the completion of Forms I-9. It is respondent's contention that the statutory wording of IRCA does not provide for citing an employer for failure to correct a mistake in preparing the Form I-9 on the initial attempt, even in those cases in which the mistake concerns only form, rather than substance.

The statutory guidelines for complying with the employment verification requirements of IRCA, including the use of a form designated or established by the Attorney General (Form I-9), to be utilized by employers to verify that the individual applying for employment is not an unauthorized alien, are those set forth at § 1324a(b). While no specific time limitations were granted statutory expression, the Attorney General, in the exercise of his rulemaking authority in promulgating the implementing regulations, at 8 C.F.R. § 274a.2, has imposed definitive document verification and Form I-9 completion responsibilities, including time frames, upon covered employers.

Specifically, covered employers must, at the time of hiring, complete Section 1 of the Form I-9 in accordance with the wording set forth at 8 C.F.R. § 274a.2(b)(1)(i)(A). In addition, covered employers must, within three business days of the hire, 8 C.F.R § 274a.2(b)(ii), physically examine that documentation presented by the individual which establishes identity and employment eligibility, 8 C.F.R. § 274a.2(b)(ii)(A), as well as complete Section 2 of the Form I-9 within that same three business day time limitation, 8 C.F.R. § 274a.2(b)(ii)(B).

Accordingly, it is readily seen that although the provisions of IRCA do not address paperwork time constraints, per se, those of the

pertinent implementing regulations clearly do so, and for that reason, that contention of respondent must be denied.

The final argument of respondent advances the proposition that the Complaint should be dismissed since respondent has demonstrated that completed Forms I-9 concerning the five individuals identified in the Complaint had been maintained in respondent's corporate headquarters in New Iberia, Louisiana.

That contention must also be denied since it is not a defense in a paperwork violation setting, as here, for an employing entity to show that the completed Forms I-9 are located at a location other than that at which the document inspection was conducted. U.S. v. Cafe Camino Real Inc., 1 OCAHO 307 (March 25, 1991).

The evidence will now be reviewed in order to determine whether complainant has demonstrated, by the required preponderance of the evidence, that respondent has violated the pertinent provisions of IRCA and the implementing regulations, as alleged, by reason of having failed to properly complete Section 2 of the five Forms I-9 at issue, which includes having done so within the required three business day period following the hiring of the five individuals at issue.

By the term "preponderance of the evidence" is meant evidence of greater weight, or evidence which is more convincing, than that offered in opposition to such evidence.

Complainant's evidence discloses that on November 3, 1989, Agents Annis and Frawley conducted a review of respondent's Forms I-9 at its Rumford, Maine job site. Valencia readily made available to them seven Forms I-9 originals, those five which pertained to those five individuals listed in the underlying NIF, Ocampo, Salgado, Antunez, Ramirez and Theriault (Complainant's Exh. 5, at 1-5), together with two other Forms I-9 originals which had been prepared for two other of respondent's employees not involved herein.

In the course of interviewing Valencia and checking respondent's IRCA related documents in respondent's work trailer at its Rumford, Maine job site on November 3, 1989, their review of the originals of the five Forms I-9 at issue has made available the following information.

Prior to detailing the information which Agents Annis and Frawley observed in the course of examining the five Forms I-9 originals at issue, it might be well to discuss the instructional wording which

appears on the reverse side of a Form I-9 in order to assist in completing that form. The written instructions in Section 2 of the Form I-9 advise that the employer is to examine one of the documents from List A and check the appropriate box, or the employer may examine one document from List B and one from List C and check the appropriate boxes. The employer is further advised to provide the document identification number and expiration date, if any, for the document(s) checked.

List A identifies the five documents that establish an individual's identity and employment eligibility. List B describes the documents that establish an individual's identity, and List C sets out the documents that establish employment eligibility. And all three lists contain separate spaces for use by employers in order to provide document identification number(s), as well as the expiration date(s), if applicable.

Ocampo's Form I-9 original contained the following information in Section 1. His name, address, date of birth as being July 23, 1966, Alien Number A 35-876-433, his printed signature was dated October 10, 1989, and none of the three blocks in Section 1 which describes his citizenship and work status had been checked. Section 2 contained Valencia's printed name, his signature, job title, respondent firm's name and address and was dated October 9, 1989. None of the 11 boxes in lists A, B, or C had been checked and therefore Section 2 of that form failed to provide any of the required information concerning document review and verification (Complainant's Exh. 5, at 1).

Respondent's payroll records for the period ending on Sunday, November 5, 1989, disclose that Ocampo began working for respondent on Monday, October 9, 1989 (Complainant's Exh. 9, at 15).

Salgado's Form I-9 original furnished the following information in Section 1. His name, address, Social Security 591-45-6320, the Alien Number A35-221-870, his printed signature, the preparation date of October 9, 1989, and none of the three blocks in Section 1, which serve to describe the applicant's citizenship and work status to a prospective employer, had been checked. Section 2 contained Valencia's name, both signed and printed, his job title, respondent firm's name and address, and was dated October 9, 1989. None of the 11 boxes in Lists A, B, and C had been checked and the only information which was given concerning Valencia's documentation review and verification concerning Salgado was given in List B, that Salgado had furnished a California identification card (Complainant's Exh. 5, at 2).

Respondent's payroll records show that Salgado had also started working for respondent on Monday, October 9, 1989 (Complainant's Exh. 9, at 15).

Antunez's Form I-9 original supplied this information in Section 1. His name, address, birth date of July 20, 1966, Social Security 576-99-9876, Alien Number A35-987-533, his printed signature, no date of preparation, and none of the three blocks in Section 1, which serve to describe the applicant's citizenship and work status, had been checked. Section 2 contained exactly the same information that had been supplied in Section 2 of Salgado's Form I-9 original, Valencia's printed name and signature, his job title, respondent firm's name and address, and the date of October 9, 1989. None of the 11 boxes in Lists A, B, or C had been checked and the only information which was given pertaining to Valencia's checking and verifying Antunez's documentation was that which was supplied in List B, that Antunez had furnished a California identification card, but as in the case of Salgado, no identification card number was listed in the space provided (Complainant's Exh. 5, at 3).

Respondent's payroll records reveal that Antunez began working for Valencia in Rumford on Monday, October 9, 1989, also (Complainant's Exh. 9, at 15).

Ramirez's Form I-9 original, in Section 1 thereof, has made available the following information. His name, address, birth date of March 28, 1959, Social Security 455-70-8234, his printed signature, the preparation date of October 31, 1989, and none of the three blocks had been checked, nor had any alien number been listed. Section 2 contained only Valencia's printed name and signature, his job title of foreman, respondent firm's name and address, and the date of October 31, 1989 (Complainant's Exh. 5, at 4).

Respondent's payroll records disclose that Ramirez began working at Rumford on Wednesday, November 1, 1989 (Complainant's Exh. 9, at 18).

Theriault's Form I-9 original's Section 1 has made available this information on him. His name, address, the birth date of June 25, 1957, Social Security 005-64-5310 or 0310 or 0610, a check mark in the block which signifies that he is a citizen or national of the United States, his written signature, a preparation date of October 12, 1989, and the certification of a preparer/translator in a space provided in Section 1 for that purpose, which contains the written and printed

signature of one Andrea Theriault, as well as her address. Section 2 contained only Valencia's printed name and signature, his job title of foreman, and respondent's name and address, the date of October 30, 1989, and none of the 11 blocks in Lists A, B, or C had been checked, nor had any information been furnished in any of the other spaces provided in that section (Complainant's Exh. 5, at 5).

Respondent's payroll records show that Theriault began his employment at Rumford on Monday, October 30, 1989 (Complainant's Exh. 9, at 18).

The foregoing documentary evidence, together with the related hearing testimony and remaining documentary evidence which was adduced by complainant, entitles complainant to a finding that the NIF at issue had been properly issued. That because a review of the contents of those Forms I-9 originals, as noted and photocopied by Agents Annis and Frawley in the course of their November 3, 1989 Forms I-9 inspection, clearly discloses that respondent, as charged, had failed to comply with the paperwork requirements of IRCA.

That because it is readily ascertainable that all five of the Forms I-9 originals at issue, according to complainant's evidence, contained no information concerning Lists A, B, or C, with the exception of the notations that Salgado and Antunez had presented California identification cards to Valencia (Complainant's Exh. 5, at 1-5), and were, therefore, obviously deficient.

The evidence which respondent has offered in opposition to that of complainant in this critical area, as summarized earlier, consists of the contention that Broussard, not Valencia, had completed the original Forms I-9 in respondent's corporate headquarters in New Iberia, Louisiana, using information which Broussard secured by telephone from Valencia shortly after Valencia signed the Forms I-9 and forwarded them to Broussard.

In that regard, respondent relied exclusively upon two evidentiary sources, copies of the five Forms I-9 originals which purportedly had been timely prepared by Broussard in New Iberia (Respondent's Exhs. A - E), presumably as a record kept in the course of respondent's regularly conducted business activities, and secondly, upon the testimony of Morton, its president, board chairman and principal shareholder, concerning the manner in which those records had been prepared by Broussard.

As noted earlier, respondent's paperwork responsibilities involved completing Section 2 of each of the five Forms I-9 at issue within three business days of hiring Antunez, Ocampo, Salgado, Ramirez and Theriault. It follows that in order to do so respondent was required to show that the required notations in Section 2 had been in fact accomplished within three business days from the pertinent dates of hire.

Respondent chose to make this information available through the testimony of Morton, and clearly failed in that regard. That because he testified that all notations on the five pertinent Forms I-9 originals other than Valencia's were those of Broussard, but he also stated that he was not present at the time Broussard marked any of those forms, nor did he know the date(s) upon which those forms were received at respondent's corporate headquarters, or presumably had been delivered to Broussard, nor was he able to testify as to the date(s) upon which Broussard had performed any act in connection with her work on those five forms. He could only state that Broussard normally completes those forms prior to issuing the weekly paychecks (T. 186, 187).

In that posture, respondent's evidence on this critically important factor is totally unconvincing and, more importantly, cannot serve as a credible basis of support in connection with respondent's contention that the five Forms I-9 at issue had been properly and timely completed. For that reason, among others, including the testimony of Agents Annis and Frawley that they had observed and photocopied the five improperly prepared Forms I-9 originals on November 3, 1989, I find that complainant properly issued NIF HLT-90-000001 on November 3, 1989 because it has been amply demonstrated by the required measure of credible evidence, that respondent had, as alleged in that citation, violated the pertinent provisions of IRCA, as well as the implementing regulations by reason of its having failed to properly complete Section 2 of the five Forms I-9 at issue.

Having resolved the facts of violation in complainant's favor, we now are obliged to grant further consideration to the appropriateness of the five separate civil money penalties which must be assessed, one for each of the five proven violations.

The five individual civil penalty sums must be assessed in amounts ranging from the statutorily mandated minimum sum of $100 for each violation to the maximum sum of $1,000 for each violation. That because the applicable provisions of IRCA provide that civil money

penalties for paperwork violations "shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." 8 U.S.C. § 1324a(e)(5).

That section of the statute also provides that in determining the amount of the penalty, due consideration shall be given to: (1) the size of the business of the employer being charged; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether or not the individual was an unauthorized alien; and (5) the history of previous violations.

In issuing the NIF at issue on May 30, 1990, complainant assessed a total civil money penalty of $3,500 for all five violations, or $1,00 for each of the three paperwork violations concerning Antunez, Ocampo and Salgado and $250 for each of the two remaining violations, those involving Ramirez and Theriault.

A review of the appropriateness of the civil penalties to be assessed under this factual setting begins by considering the first of the five required elements, the size of respondent's business. The relevant evidence on this hearing record, to the effect that respondent firm employs 300 persons in total at its Louisiana headquarters and at offices in the states of Texas and Illinois, as well as on some 25 ongoing industrial insulation job sites throughout the United States and the Caribbean, has clearly established that respondent firm is a relatively large business entity.

The second of the five criteria to which consideration must be given involves respondent's good faith. Simply stated, and in the interest of brevity and clarity, I find none under these facts. This hearing record abounds in documented instances, involving those violative record keeping practices at issue in this Complaint, as well as those alleged and thoroughly particularized in connection with the issuance and service upon respondent on March 28, 1988 of Citation POM 274A-41, that respondent's attitude concerning the paperwork responsibilities of IRCA may most accurately be described as indifferent, if not cavalier.

The third element which must be taken into account is the seriousness of the violation. Any failure to complete any portion of Section 2 of a Form I-9 must be regarded as a serious violation. U.S. v. Achieved, 1 OCAHO 95 (October 12, 1989). Similarly, an employer's failure to prepare Forms I-9 for three individuals was found to be in blatant

disregard of the statutory and regulatory mandates of IRCA, U.S. v. Cafe Camino Real, Inc., 1 OCAHO 307 (March 25, 1991). It has also been found that any violation of this type is inherently serious because of the effect of such practice upon a national policy pronouncement which the enactment or IRCA reflects. U.S. v. J.J.L.C., Inc., 1 OCAHO 154 (April 13, 1990).

The fourth criteria is that of determining whether any of the five individuals involved were unauthorized aliens. Three of the five individuals listed in the NIF, and incorporated by reference in the instant Complaint, Antunez, Ocampo, and Salgado, occupy that status. Complainant's evidence demonstrated that Antunez and Salgado were placed under arrest as unauthorized aliens and were removed from respondent's Rumford job site on November 2, 1989, as would Ocampo, also, had he been present instead of having been arrested and jailed in Oxford County, Maine earlier.

The fifth and final circumstance to which consideration must be given is respondent's history of prior violations. As noted earlier, in discussing respondent's lack of good faith under these facts, this is not respondent's first experience in IRCA-related record keeping violations.

On March 28, 1988, only 20 months or so before Agents Annis and Frawley initially visited respondent's Valencia-run job site in Rumford, Maine on November 2, 1989, complainant issued and served upon respondent Citation POM 274A-41, a 10-count citation in which respondent was charged with numerous paperwork violations under IRCA, some of which involved identical Section 2, Form I-9 violations to those at issue in this proceeding, as well as allegations that respondent had also illegally hired four unauthorized aliens on a Portland, Maine job site on that occasion (Complainant's Exh. 7, at 13-19).

That 25-page exhibit also contains the information that that earlier citation involved a job site that had been headed by a foreman named Dewey Howell, who, as Valencia did on November 3, 1989, signed a written waiver on respondent's behalf of the three-day waiting period for record inspection purposes. That March 28, 1988 citation involved alleged paperwork violations involving Sections 1 and 2 of Forms I-9 concerning 18 workers at that job site. Several instructional visits were made to foreman Howell's work trailer and at least two copies of the M-274 Employer's Handbook were hand delivered to him prior to May 27, 1988, the date upon which it was determined, in the course of

conducting a follow-up Form I-9 audit, that all of respondent's Forms I-9 at that location were found to be in order.

Although a NIF was not issued in that March 28, 1988 enforcement activity and, resultingly, no civil money penalty had been assessed against respondent, it may reasonably be viewed, in light of the facts set forth in this proceeding, as having been an experience from which respondent has definitely not benefitted instructionally. Nor has respondent seemingly acquired any discernible measure of respect for the statutorily mandated employer paperwork responsibilities established under IRCA, and about which respondent received extended instruction and written materials in connection with the earlier infraction.

By enacting IRCA, Congress significantly modified our national policy concerning illegal immigration. A critical element of that remedial legislation involves the placement of unprecedented document inspection and verification responsibilities upon employing entities in the hiring process.

With limited, inapplicable exceptions, those responsibilities consist of verifying the identity and work authorization of all individuals hired since November 6, 1986, with provisions for attendant civil money penalty assessments for violations of those paperwork duties.

There is a dual purpose in providing for such civil money penalty assessments, that of deterring repeat infractions by the employing entity cited, as well as the effect which such assessments have upon other employers similarly situated.

The range of civil money penalty sums for each violation, as noted earlier, is $100 to $1,000, and provides the enforcing agency with a discretionary range to most fairly and effectively deal with the predictable factual variances encountered in the enforcement process.

Complainant assessed a total civil money penalty of $3,500 for the five violations at issue, $1,000 for each of the three violations involving Antunez, Ocampo, and Salgado, and $250 for each of the two remaining violations concerning Ramirez and Theriault.

In levying those civil money penalties, complainant considered the size of respondent's business, the lack of good faith on respondent's part, the seriousness of these violations, the fact that three of the five

individuals involved, Antunez, Ocampo, and Salgado were unauthorized aliens, and the respondent's history of prior violations.

Such consideration has resulted in appropriate civil money penalties of $1,000 in the three violations concerning Antunez, Ocampo, and Salgado. In the remaining two violations, however, the proposed $250 civil money penalties for each of the two violations which involve Ramirez and Theriault are found to be inadequate. Therefore, each of the two civil money penalties concerning Ramirez and Theriault are being increased to $750, or a total of $1,500 for those two violations.

Accordingly, the appropriate total civil money penalty sum for these five violations is $4,500, or $1,000 for each of the three violations involving Antunez, Ocampo, and Salgado, and $750 for each of the two violations concerning Ramirez and Theriault, rather than the proposed total civil money penalty sum of $3,500 previously assessed.

Order

Respondent's June 29, 1990, request for review of the facts of violation contained in NIF HLT-90-000001, dated May 30, 1990, as well as the appropriateness of the proposed civil money penalty arising out of the issuance of that citation, is hereby ordered to be and is denied.

It is further ordered that the appropriate total civil money penalty assessment in connection with the issuance of NIF HLT-90-000001 is $4,500 rather than the sum of $3,500, as previously assessed.

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Decision and Order may be appealed in accordance with the provisions of 8 U.S.C. § 1324a(e)(7) and those provisions set forth in 28 C.F.R. § 68.1 - .52, Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices.